United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1019

To be argued by
RUDOLPH W. GIULIANI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1019

UNITED STATES OF AMERCA,

Appellee,

—v.—

BERTRAM L. PODELL and MARTIN MILLER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Bertram L. Podell and Martin Miller appeal from judgments of conviction entered on January 9, 1975 and an order entered by the Honorable Robert L. Carter, United States District Judge, on January 9, 1975, denying their motions for the withdrawal of their guilty pleas which were entered by them in the United States District Court for the Southern District of New York on October 1, 1974.

On July 12, 1973, Indictment 73 Cr. 675, was filed in ten counts. Count One charged the two appellants and co-defendant Herbert S. Podell with conspiracy to defraud the United States and conspiracy to violate Sections 201 and 203 of Title 18, United States Code, in violation of Title 18, United States Code, Section 371; Count Two charged Bertram L. Podell and Herbert S. Podell with receiving and soliciting bribes; Count Three charged only

Bertram L. Podell with the acceptance of a $29,000 bribe in violation of Title 18, United States Code, Section 201(c) and 2; Count Four charged Martin Miller with offering a bribe in violation of Title 18, United States Code, Section 201(b); Count Five charged Bertram L. Podell and Herbert S. Podell with the acceptance of compensation in violation of Title 18, United States Code, Section 203(a) and 2; Count Six charged Martin Miller with offering compensation in violation of Title 18, United States Code, Section 203(b); Count Seven charged the three defendants with conspiracy to defraud the United States and to obstruct justice, to give false statements, to commit perjury before a Federal Grand Jury and to violate Sections 1001, 1503, 1510 and 1623 of Title 18, United States Code;* Count Eight charged Herbert S. Podell alone with the making of false statements, in violation of Title 18, United States Code, Section 1001; Count Nine charged Bertram L. Podell with the making of false statements in violation of Title 18, United States Code, Section 1001; Count Ten charged Bertram L. Podell with making false declarations before a Federal Grand Jury in violation of Title 18, United States Code, Section 1623.

Prior to trial the Government moved, pursuant to Title 18, United States Code, Section 3503, to take the deposition of a prospective Government witness. On January 14, 1974, Judge Carter denied the motion. The Government petitioned this Court for a writ of mandamus directing Judge Carter to order the deposition and on February 27, 1974, this Court issued the writ. *United States* v. *Carter,* 493 F.2d 704 (2d Cir. 1974).

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* Count Seven was dismissed on consent of the Government prior to trial.

Trial of Bertram L. Podell and Martin Miller commenced on September 16, 1974, and continued until October 1, 1974.* On October 1, 1974, Bertram L. Podell withdrew his plea of not guilty and pleaded guilty to Counts 1 and 5, and Martin Miller withdrew his plea of not guilty and pleaded guilty to Count 1. On January 9, 1975 Judge Carter denied motions by both to withdraw their guilty pleas. Podell was sentenced to two years imprisonment on Count 1 with the execution of all but six months of the sentence suspended and on Count 5 was fined $5,000; Miller was sentenced to two years imprisonment on Count 1 with all but six months of the sentence suspended and fined $10,000.

Podell and Miller are free on bail pending this appeal.

Statement of Facts

A. The Trial

The Government established that Bertram L. Podell, while a Member of Congress, was paid over $41,000.00 in the form of legal fees and campaign contributions by Martin Miller in order to advocate the interests of Miller's airline in proceedings pending before the Civil Aeronautics Board (CAB), the Federal Aviation Administration (FAA), the State Department and the Government of the Bahama Islands. The evidence at trial also established that Podell lied to agents of the Federal Bureau of Investigation when he denied various material facts connected with his representation of Miller's airline, and lied to a Federal Grand Jury, when he stated under oath that he had told the full and complete truth to the FBI.

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* The case against defendant Herbert S. Podell was severed prior to trial.

A detailed summary of the evidence presented at trial is included as an addendum to the brief. It has been added to set forth the background for the Government's argument in support of Judge Carter's ruling on the reasons for the defendants guilty pleas, as well as the Government's arguments as to the factual basis for the pleas and the defendants understanding of the conspiracy charges.

B. The Plea

The tenth day of trial began on October 1, 1974. Podell had been on the witness stand for a day and a half. At the conclusion of the luncheon recess, at approximately 1:45 p.m., on October 1, and prior to Podell's resuming the stand for continued cross-examination, counsel for Podell informed the Government that Podell wanted to plead guilty to more than one count in the indictment. There had been prior plea discussions, and the Government had refused to take a plea to only one count. (H. 31-32, 46).*

After discussions among counsel and with the Court, which are outlined below, Podell pleaded guilty to count one, the conspiracy count, and count five, the conflict of interest count. Miller pleaded guilty to the conspiracy.

Podell's counsel, during the *voir dire* preceding acceptance of the plea, explained that Podell was pleading guilty to the substantive conflict of interest count and to that part of the conspiracy count that charged conspiracy to defraud the United States and to violate the conflict of interest statute. (Tr. 1428).** Judge Carter personally then questioned Podell and Podell indicated that this was in fact what he was doing. (Tr. 1429). Podell then indicated

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* "H" refers to transcript of the hearing on the defendant's motions to withdraw their guilty pleas held on January 7 1975.

** "Tr." refers to the Trial Transcript.

he was pleading guilty voluntarily and that there was no coercion by the Government and no promises by counsel. Podell also indicated that he had thoroughly discussed this matter with his attorney and understood the rights he was waiving by pleading guilty. Podell stated that while he was a Member of Congress he was compensated for advocating the interests of Florida Atlantic Airlines before various federal agencies, including the CAB and FAA, and that although he did not at the time realize this violated any law, he fully intended to do what he did. (Tr. 1430-31). Counsel for the defense then asked the District Court to incorporate in the *voir dire* the Government's statement as to its understanding of the plea. Counsel for the Government then stated that the Government's position was that the plea to the conspiracy count admits that the object of this conspiracy was to violate the conflict of interest law and thereby to defraud the United States and that it does not admit the bribery objects of the conspiracy. The Government then outlined the maximum penalties under both sections.

Counsel for defendant Miller then announced to the District Court that Miller was offering to plead guilty to the conspiracy count and specifically those portions that involve conspiracy to defraud and to violate the conflict of interest statute. The District Court then conducted a *voir dire* of Miller that included Miller's affirmation that the plea was entered "without regard to any pressures that have been brought on you or threats by the government or promises by your attorney." (Tr. 1434). Miller explained that he retained Podell to use his influence on Miller's behalf and that he did so knowingly and intentionally. The Government then indicated that it was agreeable to taking this plea to conspire to defraud and to violate the conflict of interest statute.

C. The Hearing

On January 2, 1975, a week before the scheduled sentence, the Government sent a letter to Judge Carter, setting forth "certain matters which we would like the Court to consider prior to the sentencing proceeding." Copies were sent to defense counsel.

The letter did not recommend any sentence; that is, it did not recommend a particular term of imprisonment, a particular fine or even recommend imprisonment in general. It referred in its opening paragraph to the Government's practice, pursuant to agreement with Judge Frankel, of not recommending specific sentences "unless requested by the Court in advance."

The letter then went on to outline various elements for the Court to consider in imposing sentence as they related to this case, including, on the negative side, the seriousness of the crimes the defendants had committed, the value in such cases of deterrence, the importance of equal administration of the laws, and the defendant Podell's persistent lying under oath. On the positive side, the Court was formally told of the "valuable information" and "substantial cooperation" Miller had provided before being indicted and electing to stand trial, points to be weighed in Miller's favor. However, the letter made absolutely *no recommendation* as to the sentence the Court should impose.

On January 9, 1975 the very day sentence was to be imposed, Podell and Miller moved orally for an adjournment so that motions could be submitted for leave to withdraw their pleas of guilty. Although Judge Carter took the position that the letter had little, if any, significance to him, he set an evidentiary hearing for 4:30 p.m. that day (H. 4-5, 6-7).

Just before the hearing began, the defendants served their papers moving to withdraw their pleas, supported by the affidavits of their attorneys. Podell's attorney, James M. LaRossa, Esq., alleged that the plea had resulted from "many hours" of negotiations, and had been intended primarily, from Podell's standpoint, to preserve "a position whereby he could retain his status as a Member of the New York Bar. Without question, this was the most important consideration in the 'plea bargaining' and ultimately the withdrawal of his not-guilty plea." (LaRossa Affidavit ¶ 6). In his affidavit, Mr. LaRossa claimed that the Government had promised the defendant Podell and his counsel "that the Government would not recommend imprisonment and, further, would take absolutely no position at the time of sentence." (LaRossa Affidavit ¶ 7; *Compare* H. 57). He added that Assistant United States Attorney Rudolph W. Giuliani also had agreed to testify at a Bar Association hearing "that there was no bribery in this case and, further, that the offenses of which the defendant was convicted did not reflect [a] corrupt and criminal intent." (LaRossa Affidavit ¶ 8).

The affidavit of Miller's counsel, on the other hand, said only that he had been informed during plea bargaining negotiations that it "was the position of the United States Attorney's office not to recommend a specific sentence" and that the Government "would recommend to the Court neither a suspended sentence nor on the contrary, would they recommend that the defendant receive *a specific jail sentence.*" (Marx Affidavit ¶ 4) (emphasis added). The attorney, Richard Marx, contended in his affidavit that it was that part of the letter "drawing the Court's attention to the seriousness of the crimes committed" that offended "the intent and spirit of the plea bargaining negotiation." * (Marx Affidavit ¶ 5).

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* Podell's attorney, however, said during argument preceding the hearing that the Government had "a right to say it was a serious case or whatever . . ." (Tr. 9) and argued that other parts of the letter were objectionable.

Before hearing any testimony about what had been negotiated before the plea, and in particular about the Government's statement to defense counsel that it would make a statement arguing the facts of the case and seriousness of the crime but not recommend a specific term of imprisonment, Judge Carter came to the conclusion that the letter was "a recommendation for a jail sentence," even though the letter made no such recommendation. (H. 15).

The hearing included the testimony of the defendants Podell and Miller and their counsel—Messrs. LaRossa, Shargel and Marx, as well as the testimony of Assistant United States Attorneys Rudolph W. Giuliani, Joseph Jaffe and Michael B. Mukasey. The testimony differed sharply over what had and had not been stated with respect to the Government's position at sentencing.*

1. The Defense Claim

Podell testified first. He acknowledged that he had participated in negotiations concerning the specific charges to which he would plead guilty and the statement he would make as to his involvement in those crimes. (H. 21-22). However, he claimed that Mr. Giuliani's position during plea negotiations was that the Government wanted "to help." According to Podell, Mr. Giuliani said that the Government would take "absolutely no position" at sentence. Podell added that the prosecutor although he had been involved in a year and a half investigation of Podell, ten days of trial and in the middle of his cross-examination of Podell which revealed prior perjurious statements, had assured him that "no one wants to see you go to jail." (H. 18). He insisted that Mr. Giuliani had volunteered, without solicitation, to "be your witness at the Bar Association hearing. I [Giuliani]

* It was however, uncontroverted that plea negotiations had begun at the request of Podell's counsel during a luncheon recess while his client was in the midst of cross-examination.

will testify that there was no bribery involved, and he [Giuliani] used the following words, that this was an unwilful . . . technical conflict of interest and nothing more, and that will save your license." (H. 19, 24, 27) Podell also testified that during a pre-trial deposition of a Government witness, Mr. Jaffe, another Assistant United States Attorney assigned to this case, told Podell that the Government did not want to see him go to jail. (H. 26)

Podell, under questioning by Judge Carter, told the Court that when he denied prior to pleading guilty, that any promises had been made to him, he did so because he had been instructed to keep these representations confidential. (H. 28-29). When pressed as to who it was that told him this, Podell said he could not remember. (H. 29-30).

Podell's chief counsel, James La Rossa, testified that he had initiated the discussions concerning his client pleading guilty. (H. 54). He admitted that this decision to plead guilty was motivated, at least in part, by "the conduct of the trial." (H. 61).

LaRossa testified that at first he wanted the Government to recommend a suspended sentence which was rejected "out of hand" by Government counsel (H. 57). However, LaRossa claimed he received a promise from these same Government attorneys that they would make no recommendation as to sentence. LaRossa did acknowledge that: "It is true that Mr. Giuliani [reserved] the right at the time of sentence to submit the facts to the judge. That portion I do recall even though the affidavit doesn't state it." (H. 57). Actually, in his affidavit in support of the motion. La Rossa had sworn that there was an agreement that the Government "would take absolutely no position at the time of sentence." (La Rossa Affidavit ¶ 17). When faced with this glaring contradiction, La Rossa dismissed as "semantics" the question of whether

the Government's presentation of facts at sentence constituted "taking a position." (H. 62).

Concerning the bar association issue, La Rossa testified on direct examination that Giuliani had agreed to testify as to the crimes Podell admitted in his guilty plea. LaRossa also testified that Giuliani had described the crimes as "technical violations." When pressed LaRossa admitted he could not recall whether these words were used. (H. 60).

La Rossa, on cross-examination, said he had no recollection of the prosecution gratuitously stating that the Government wanted to help Mr. Podell. (H. 64). La Rossa admitted that the long negotiations involved discussions as to what Podell would admit during the allocution and the statement the Government would make as to its understanding of the plea. (H. 66-69).

Under questioning by the Court, La Rossa testified that during these plea negotiations he had a meeting with Judge Carter to determine whether the Court would give an indication of the sentence that would be imposed. (H. 71-72) La Rossa stated that the Court refused to do so. La Rossa also admitted that during this conference he told the Court that one of the main reasons for the plea was that La Rossa was concerned that Podell would be convicted on the bribery counts and consequently be automatically disbarred. (H. 72-73). La Rossa admitted that during this conversation he never mentioned anything about these alleged representations by the Government. La Rossa also was forced to admit that in spite of the fact that he claimed his client had been given all these important promises by the Government prior to the plea, they were not in the record and in fact were specifically disavowed. (H. 74) He offered no explanation for this.

Gerald Shargel, Mr. La Rossa's associate, generally supported La Rossa's testimony. During cross-examination,

Shargel, not in response to a question but apparently as an afterthought, stated that during the trial Assistant United States Attorney Jaffe had agreed with him that Podell was not a corrupt Congressman. (H. 85). Jaffe flatly denied ever making such a statement. (H. 94). Shargel later added that he had had a similar conversation with Mr. Giuliani. (H. 85).

The other defendant Martin Miller testified that Mr. Giuliani in the presence of Mr. Jaffe and Mr. Marx, had said the Government "would not take a position with regard to sentencing" (H. 76) and that the Government would "go to bat for me" by making his cooperation known to the sentencing judge. (H. 77).

Richard Marx, Miller's counsel, testified that he felt the end of the letter was "extremely favorable" to Miller, but this was negated by the first two pages. He said that when he told Mr. Mukasey earlier that week that the letter was "good" he was referring only to the end of the letter discussing Miller's cooperation. (H. 114-115).

2. The Government's Position

Assistant United States Attorney Rudolph W. Giuliani testified that the plea negotiations were on all occasions initiated by defense counsel. He explained that Podell's lawyer had made two offers to plead Podell guilty prior to the final offer on October 1, 1974. The first was on the day before the trial was to commence and the second during the trial, immediately after the Court had denied defense motions to dismiss at the conclusion of the Government's case. Giuliani explained that the Government had rejected these prior offers as insufficient. (H. 31, 46).

Giuliani testified that the final offer was made after Podell had undergone several hours of cross-examination

and during a luncheon recess, at which point Mr. La Rossa indicated that Podell was now very anxious to plead and that he was offering to plead guilty to more than what they had previously offered. (H. 31-32, 46). Mr. Giuliani explained that the discussions almost exclusively concerned which counts Podell would plead to and which objects of the conspiracy he would admit. (H. 48-49).

As to the subject of sentencing, Mr. Giuliani testified that Mr. La Rossa asked him if he knew if Judge Carter would make his position on sentence known prior to accepting a plea. Giuliani answered that he did not know and that in any event the Government opposed this practice. (H. 34-35). Mr. Giuliani then testified that he and Mr. Jaffe joined Mr. La Rossa in a conference with the Judge, which the Government attorneys thought was arranged to explain to the Court the reason for the delay in resuming trial after the conclusion of the luncheon recess. Instead, La Rossa asked if the Judge would give a preview of his sentence, and before the Government could register its objection, the Court refused to do so. (H. 35-36). The Government then told the Court that it objected to this practice. (H. 37).

Mr. Giuliani testified that he never at any time told defense counsel or the defendants that the Government would not recommend a jail sentence or that it would take no position at the time of sentence (H. 37-38). In fact, he testified that the Government's position at sentence was not a subject of negotiation. (H. 38). Rather it came up as a statement of the Government's usual policy that it would make a statement as to the facts of the case and the seriousness of the crime without making a recommendation of a specific term of imprisonment unless requested by the Court. (H. 38-39, 47) Giuliani explained to La Rossa that if the Court requested a recommendation as to a specific term of imprisonment, a recommendation would be made

after discussion by a committee consisting of the United States Attorney, the Chief Assistant, the Chief of the Criminal Division and the Assistants involved in the case. (H. 47). Giuliani also testified that after the plea negotiations were completed and the parties were in the courtroom waiting for the Judge, he repeated to La Rossa that: (1) the Government would not recommend a specific term of imprisonment unless requested to do so by the Court; (2) that if asked, it would make a specific recommendation; (3) however, that the Government would not simply have nothing to add to the presentence report, but it would make a strong statement arguing the facts of the case and the seriousness of the crime. (H. 49-50).

Giuliani testified that at one point LaRossa had asked Giuliani whether, if called, he would testify for Podell before the Bar Association. When Giuliani made certain it was not character testimony he was to offer, but merely testimony that Podell had not pleaded guilty to bribery, he agreed and, at La Rossa's request, repeated that agreement to Podell. But he added that that conversation *preceded* discussion about the statement that the Government would make at the time of the plea, which statement essentially comprised the proposed testimony before the Bar Association and therefore obviated it. (H. 39-42)

Giuliani denied telling Podell that he wanted to help Podell, that he did not want to see Podell go to jail, or that Podell's offense was, in words or substance, "an unwilling technical conflict of interest." (H. 53)

As for the negotiations with Miller, Mr. Giuliani testified that on a number of occasions prior to October 1, 1974 Richard Marx, Mr. Miller's attorney, had discussions with Mr. Jaffe and himself concerning Miller's pleading guilty. Giuliani explained that Marx wanted a recommendation of a suspended sentence and the Government consistently refused to make such a recommendation. (H. 43-44).

Assistant United States Attorney Joseph Jaffe testified that during negotiations preceding the plea he and Mr. Giuliani specifically told defense counsel that the Government would "argue the facts of this case and the seriouness of this case at the time of sentence and in substance that the Government was not going to stand mute. I recall saying to Mr. Shargel specifically that in this case we were not going to sit on our hands." (H. 91, 97) Jaffe also recalled that during the pre-plea conversation with the Court and defense counsel, either he or Mr. Giuliani, said that "the Government wanted to be free to make an argument at the time of sentence and the acceptance of the guilty plea to those two counts was not a signal as to what would happen." (H. 92). Mr. Jaffe testified that neither he nor Mr. Giuliani told the defendants or their lawyers that the Government would not recommend imprisonment or that the Government would take no position at the time of sentence. (H. 93-94). Jaffe denied ever agreeing with Shargel that Podell was not a corrupt Congressman and added "I can't imagine why I would." (H. 94). Jaffe said he recalled no conversations in which any of the Government attorneys told Mr. Podell that they wanted to help him or not see him go to jail. Jaffe added that this did not sound like anything that was said. (H. 95)

Assistant United States Attorney Michael B. Mukasey testified that plea negotiations testified to by Podell and others had involved negotiation as to which parts of the indictment would be included in Podell's plea of guilty and what Podell and the Government would say at the time the plea was entered. (H. 111-112). Mukasey stated that there was no discussion during this meeting concerning the Government's position at sentence or testimony for Podell at the Bar Association. (H. 111-112). Mr. Mukasey said that he specifically heard Mr. Giuliani tell La Rossa and Shargel that at sentence the Government would not stand mute and rely on the pre-sentence report, that the

Government would make a statement and that that statement would be a "strong" one. (H. 109-110). Mukasey testified, in an effort by the Court to save time, that his recollection on all the other facts testified to by Messrs. Giuliani and Jaffe was the same. (H. 108).

In addition, Mr. Mukasey testified to a conversation three days before the hearing with Mr. Marx in which he read to Miller's counsel the January 2 letter and Mr. Marx's reaction was that it was a "good letter." (H. 112-113).

3. The Court's Finding

Judge Carter, after the testimony, referred to his earlier ruling that the Government's January 2 letter had recommended jail, and proceeded from there to determine whether the letter had violated any representation by the Government. He noted that the Government had recommended no "specific prison term and argues that this letter does not violate a representation. While this may be technically correct, I view the letter in essence as a violation of the spirit, if not the letter of the agreement." (H. 116). The "spirit" of the agreement was not otherwise articulated. However, the Court also held that the Government's representation or agreement, whatever it may have been, did not "play a material or significant part in the plea of either Mr. Miller or Mr. Podell. I am persuaded that the reason Mr. Podell pleaded guilty to the conflict of interest count, was principally and primarily and exclusively because he was concerned that the jury might find him guilty of the bribery count and that he would automatically be disbarred." (H. 117) The Court found further that Podell, faced with the possibility of a conviction that would bring automatic disbarment, "aborted the trial" by pleading guilty to a conflict of interest so that "he at least has a fighting chance to maintain his license to practice law. . ." (H. 117).

As to Miller, the Court noted that once Podell pleaded, Miller "had nothing else to do." (H. 117) Although the basis for that conclusion was not stated, the Court was aware before and during trial that Miller had confessed before the grand jury to the entire scheme.

Judge Carter made no explicit finding as to whether or not the letter had influenced him in imposing sentence. However, he did say that the letter had little significance to him, it was unsolicited and that he didn't want it. (H. 4-5, 6-7, 13).

Before imposition of sentence, Podell, in a rare if not unique moment of candor, acknowledged that, "I guess I did violate the law and as a lawyer, I must realize that. As a lawmaker, I have to realize that there was a law that I violated and so I was compelled to pay." (H. 137-138). The remainder of his allocution before sentence was given over wholly to describing the ignominy already inflicted on him and his freedom from moral taint. (H. 135-139).

Miller admitted that although he was unaware at the time of his actions of the federal conflict of interest statutes, "I did know what I was doing was wrong from a moral point of view. It was a shortcut, it was just a ruthless way of accomplishing my own objectives. And I can only tell the Court that I am truly sorry for my actions, and I can only say that it will never be something that I will do again. There is a morality that is even beyond the law and had I followed that I would not have violated the law." (H. 140)

The Court sentenced both defendants to terms of two years imprisonment, all but six months of which was suspended. In addition, Podell was fined $5,000 and Miller $10,000.

ARGUMENT

POINT I

The Government made no promise to the defendants that was in any way violated by its letter to the Court which argued the facts of the case and the seriousness of the crime without expressly recommending a jail sentence. In any event the Trial Court's ruling that the Government representation did not play a material part in the decision to plead guilty is supported by the record.

The appellants argue that the Trial Court's finding that their pleas were induced by their fear of conviction on the bribery counts, and not by any representations as to the Government's position at sentence, was clearly erroneous and should be reversed. Judge Carter's finding was based on his evaluation not only of the evidence presented at a hearing on this very issue, but also on his observations during the trial, the plea discussions and the *voir dire* preceding acceptance of the guilty pleas. The appellants had the burden of proof on this claim and the Court's ultimate factual conclusion is so overwhelmingly supported by the record that it cannot be held to constitute an abuse of discretion or to be clearly erroneous. *United States* v. *Giuliano,* 348 F.2d 217 (2d Cir. 1965), *cert. denied,* 382 U.S. 946 (1966); *United States* v. *Hughes,* 325 F.2d 789, 792 (2d Cir. 1964); *United States* v. *Smiley,* 322 F.2d 248 (2d Cir. 1963).

Appellants' reliance on *Santobello* v. *New York,* 404 U.S. 257 (1971) is wholly misplaced. In *Santobello* a state prosecutor promised a defendant that in return for a guilty plea to a count charging a lesser included offense, the state would not recommend the maximum sentence of one year imprisonment. At sentence a different prosecutor specifically recommended a one year sentence, citing as support

for this recommendation Santobello's criminal record and links with organized crime. The State conceded that the prosecutor made the promise not to recommend the maximum sentence. The Supreme Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. The Court found in *Santobello* that the promise was made as part of the plea bargain, was a material part of the plea and was breached. It, therefore, remanded the case to the state court either for re-sentence or vacation of the plea.

The three critical facts in *Santobello* are not present in this case: (1) no promise as to a position at sentence was made by the Government as part of a plea bargain, much less a promise that the Government would not recommend a jail sentence; (2) the representation that was made was not violated; and (3) the Government's position at sentence was not a significant factor motivating the appellants to plead guilty.

The facts of the present case fall squarely within those of *United States* v. *Lombardozzi,* 436 F.2d 878 (2d Cir.), *cert. denied,* 402 U.S. 908 (1971) (hereinafter "*Lombardozzi* I"), 467 F.2d 160 (2d Cir. 1972), *cert. denied,* 409 U.S. 1108 (1973) (hereinafter "*Lombardozzi* II"). Lombardozzi decided to plead guilty after hearing the testimony of the Government's chief witness. During the plea negotiations an FBI agent "conveyed" to Lombardozzi the idea that he could receive a concurrent sentence. Lombardozzi argued that this constituted a promise of a recommendation for a concurrent sentence, that the promise was a significant inducement for the plea and since the Government did not recommend a concurrent sentence, the plea must be vacated under *Santobello.*

This Court held in *Lombardozzi* II that, in spite of the trial court's confusing finding on whether the FBI agent's statement constituted a promise, 467 F.2d at 163, n. 4, the representation made did not constitute a clear promise under *Santobello,* because it was not one that "can be said to be part of the inducement or consideration" for the plea. That conclusion was based on the fact that Lombardozzi was not naive, nor uncounselled, fully understood the scope of the Government's representation to him and stated at the time of the plea "that no threats prompted the pleas and that there were no 'inducements' of which the court had not been informed." 467 F.2d at 163.

In this case, unlike *Santobello,* but similar to *Lombardozzi,* the Government does not concede that it made any promise to either defendant as to the Government's position at sentence, much less a promise not to recommend a jail sentence; the Government did not breach any alleged representation since it did not recommend a jail sentence in its letter to the Trial Court; and, considering the sophistication of the defendants, the experience of their counsel, the fact that the pleas were negotiated and entered after many days of trial and the specific statement by the defendants that the pleas were voluntary and not induced by any threat or promise, the alleged representation could not in any significant way have affected the decision to plead guilty.

A. The Government Did Not Promise It Would Not Recommend A Jail Sentence.

The Government *did not* promise either defendant that it would not recommend imprisonment at the time of sentence. Government counsel testified that in their pre-plea discussions with Podell's counsel on the question of sentence it was made clear that the Government would take its usual position: that is, it would not recommend a *specific term of imprisonment* unless requested to do so by

the Court, but that it would make a statement setting forth its version of the facts* and arguing the seriousness of the crime.**

These representations, which were in the nature of a recitation of the Government's usual position at the time of sentence to point out aggravating facts and not make a specific recommendation, are not "promises" in the sense of being offered or accepted as part of the plea bargain as in *Santobello.*

To understand that these statements were not promises in the *Santobello* sense, it is necessary to view them in the context in which they were made and to pay attention to the words that were used. The major factors at issue during the so-called plea negotiations were the number of counts to which the defendant Podell would plead guilty and after that was resolved, the objectives of the conspiracy he and Miller would admit during *voir dire.* Both defendants and the Government compromised their original positions on these issues and the eventual, final positions of both sides were carefully made a matter of record. The issue of sentence or the Government's position at the time of sentence was never a part of this bargaining process.***

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* This was conceded by counsel for Podell. (H. 57).

** This was testified to by the three Government attorneys present at the various times it was said. One of the Assistants specifically recalled that the statement was described as a strong one. (H. 37-38, 47, 91, 92, 93-94, 97, 111-12)

*** The fact that the Government's position at the time of sentence was not at issue as one of the negotiating points for the plea is best illustrated by Assistant United States Attorney Giuliani's answers to Podell's lawyer's questions during the Hearing:

> "A. What I remember saying to you is that the Government would not recommend a specific term of imprisonment in this case, unless asked to do so by the Court. That's what I remember saying.

[Footnote continued on following page]

The issue of sentence arose when counsel for the defendants wanted a pre-plea commitment from the trial court that it would not impose a jail sentence. The Government objected to this attempt to get the judge to commit himself on the sentence and Judge Carter refused to do so. (H. 71-74, 35-37) Counsel for the defendants also wanted the Government to recommend a suspended sentence. The Government consistently took the position that it would not do so, (H. 57) that it would take its usual position at the time of sentence, and in that context explained that meant it would not recommend a specific term of imprisonment* but would argue the facts of the case and the seriousness of the crime at the time of sentence. (H. 38-39, 91-92, 97) The Government did not view this statement of policy as a promise or inducement to plead guilty, but rather as a statement of its usual procedure which is followed whether a defendant is convicted by plea or after trial. Consequently, the Government did not make it part of the record at the time of the plea.

Nor did defense counsel or the defendants view it as a representation which had any relation to the plea. Defense counsel painstakingly made part of the record all the bargained-for-positions of the parties; the number of counts, the objectives of the conspiracy admitted and the timing of

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Q. Isn't that the Government's position in every case? A. That is the Government's position.

Q. Are you suggesting that I asked you that, as part of this negotiation? A. No, you didn't ask me for it. I told you that." (H. 38)

* Indeed, the affidavit of Miller's counsel in support of the motion to withdraw the plea concedes the Government's version of its representation. Miller's counsel in his affidavit said he had been informed during plea negotiations that it "was the position of the United States Attorney's office not to recommend a specific sentence" and that that the Government "would recommend to the Court neither a suspended sentence nor on the contrary, would they recommend that the defendant receive *a specific jail sentence.*" (Marx Affidavit ¶ 4) (emphasis added)

the sentencing, which was postponed until after January 1, 1975 to enable Podell to collect his pension as a retired Congressman, rather than forfeiting it as a convicted felon. (Tr. 1432-33) Had this statement of the Government's position at sentence been considered a promise, it surely would have been included with the others that were put on the record at the time of the plea. This exclusion, and the defendants' statements that no threats or promises induced their pleas, take on an even greater significance since counsel for Podell briefed and argued both *Lombardozzi* cases in this Court, and presumably were on more than usual notice that if these representations were considered a promise related to the plea they should have been put on the record.

Considering the nature of the representation as a statement of the Government's usual position, the failure of counsel to include it as a part of the bargained-for-position of the parties, the disavowals of the defendants and the explicit prior experience of counsel for Podell, the defendants cannot, after the plea is accepted and the trial aborted, be permitted to have such statements construed as "promises".

Similarly, Podell's attempt to characterize the prosecutor's agreement to testify as to the nature of the plea at the Bar Association as a promise that significantly induced him to plead guilty is absurd. Podell's brief attempts to paint this testimony as some form of character evidence which was volunteered by the prosecutors and is now worthless because it can be impeached by the statements made in the January 2, 1975 letter to the Court. However, the evidence at the Hearing makes it quite clear that the whole question of testimony before the Bar Association concerned testimony clarifying exactly what Podell admitted during his plea. Podell's lawyer was concerned that the Bar Association would be confused about a plea only to certain objects of a conspiracy. La Rossa asked Giuliani and Jaffe whether they would testify at the Bar Association. Giuliani

first, thinking this meant testimony as a character witness, refused, but when La Rossa clarified that this was not as a character witness but to explain the nature of Podell's plea, Giuliani agreed. The Government never agreed to testify that it viewed these offenses as merely technical, but to testify that Podell pleaded guilty to conflict of interest and conspiracy to violate the conflict of interest statute and not bribery. (H. 39-42) It is undisputed that these conversations took place before the Government agreed to make a statement setting forth the extent and limitations of the plea, a statement specifically incorporated in the *voir dire* by Podell's lawyer. (H. 1431-32) Although such testimony is now unnecessary since the Government's statement on the record can be introduced at any Bar Association hearing, the Government attorneys obviously could, if necessary, testify to the exact nature of the plea. The letter has absolutely no affect on this testimony and does not tend to impeach it in any way.

B. The Representation Was Not Breached.

The letter submitted by the Government was squarely within the scope of what it had told defense counsel was the position the Government would take at the time of sentence—a statement as to the facts of the case and the seriousness of the crime. Unfortunately, prior to hearing any of the testimony as to what had been agreed upon by counsel, the Trial Court took the position that because the letter could be interpreted as a recommendation of a jail sentence, even though it did not do so explicitly, it amounted to such a recommendation. (H. 13)

However significant or insignificant the distinction between a statement which can be *interpreted* as a recommendation of a jail sentence and an *express* recommendation of a jail sentence, this was the distinction explained to all parties prior to the plea and the letter submitted scrupu-

lously observed that distinction. Viewing the letter in the light of an understanding that the Government would not recommend a specific jail sentence but would make a statement as to its version of the facts and the seriousness of the crime, the only letter that could result was one that implicitly recommended jail but refrained from doing so expressly.

The simple fact is that the Government's letter does not recommend a jail sentence. It can be read as a recommendation of a jail sentence but, certainly, any argument by a prosecutor as to the facts of the case and the seriousness of the crime at the time of sentence could be interpreted as an implicit recommendation of a jail sentence.

The District Court's finding that the Government did not "technically" violate the agreement is necessarily based on the prosecutors' testimony that they made clear to the defendants and their attorneys that the Government would not recommend a specific jail sentence and that the letter, in fact, does not recommend a jail sentence. The District Court's related finding that this violated the "spirit of the agreement," although mystifying in light of the testimony that the Government would make a strong statement and Miller's counsel affidavit conceding that the Government said merely that it would not recommend "a specific jail sentence" (Marx Aff., ¶ 4), is apparently based on the

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* A prosecutor at sentence can take one of several positions: (1) recommend that no jail term be imposed, (2) have nothing to add to the pre-sentence report; (3) make a statement as to the facts of the case and the seriousness of the crime without expressly recommending the sentence the Court should impose; (4) make an express recommendation that imprisonment be imposed; (5) make a recommendation as to a specific term of imprisonment. The distinctions among these positions may often be small, but they are distinctions often bargained for during the plea bargaining process and specifically explained during this particular plea bargaining.

Court's original view that a statement that can be fairly *interpreted* as recommending a jail sentence is the same as an *express* recommendation of a jail sentence.

It is the Government's position that it violated neither the words nor the spirit of its representations to defense counsel and that the letter was exactly the kind of "strong" statement about the facts of the case and the seriousness of the crime, which Government counsel told the defense lawyers they would submit to the Court.

C. The Government Representation Was Not A Part of the Inducement or Consideration For the Plea.*

Whatever the exact nature of the representation made by the Government or the interpretation of the letter, these matters played no important part in the appellants' decisions to plead guilty. They hardly had such a coercive impact on the appellants that their guilty pleas can be found to be involuntary. *Brady* v. *United States,* 397 U.S. 742, 749 (1970); *United States* v. *Malcolm,* 432 F.2d 809, 814 (2d Cir. 1970). The defendants now assign monumental importance to these alleged representations, which at the time were not mentioned to the Trial Judge either as part

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* The *Lombardozzi* cases rise to alternative arguments, both supporting the Government in this case. Under *Lombardozzi* II, *supra,* the Government's representations were not *Santobello* promises because they were not made or accepted as inducements to plead guilty. See Point I A, *supra.* Under *Lombardozzi* I, these representations, even if they could be construed as having been made or accepted as inducements to plead guilty, still do not rise to the level of *Santobello* promises because they were insignificant when compared with other factors that induced the plea, such as the imminence of Podell's conviction of crimes that would result in automatic disbarment, which loomed ever closer, the longer he stayed on the witness stand.

of the off- or on-the-record discussions about the plea and were specifically disavowed by the appellants under questioning by the District Court.

A guilty plea is usually the product of many factors and the significance or insignificance of any one factor can only be determined by considering all of the relevant circumstances. *Haynes* v. *Washington*, 373 U.S. 503, 513 (1963); *Brady* v. *United States, supra.* In a case such as *Santobello* where a plea is entered before trial, the prosecutor's position at sentence takes on great significance. Similarly, in a case like *Santobello* the judge has had relatively little experience with the case from which he can evaluate the reasons motivating the plea. In such a case, where a plea is entered before trial an appellate court has available almost all the data available to the trial judge in reviewing the Court's findings as to those factors which actually were significant parts of the plea bargain.

However, in a case where the plea was entered after the entire Government case was presented, and in the midst of cross-examination, the trial judge's conclusions as to the reasons for the change of plea are based on the actual experience of having observed it happen and not just on a cold record.*

The Trial Court here found that "the reason Mr. Podell pleaded guilty to the conflict of interest count, was principally and primarily and exclusively because he was con-

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* For example Judge Carter's finding that Miller had no choice but to plead guilty once Podell had pleaded guilty is obviously based not only on the overwhelming evidence of Miller's guilt, but also on the fact that the Judge knew from pre-trial motions and reading 3500 material that Miller had confessed to this transaction in over one hundred pages of grand jury testimony. Once Podell pleaded, the *Bruton* problem, *Bruton* v. *United States*, 391 U.S. 123 (1968), precluding admission of those statements would disappear and these admissions would virtually assure Miller's conviction.

cerned that the jury might find him guilty of the bribery count and that he would automatically be disbarred." As to Miller, the Court found that "once Mr. Podell pleaded guilty, Mr. Miller had nothing else to do. So that he had no choice, once Mr. Podell pleaded." (H. 117).

Judge Carter, in making his findings as to the actual inducements for the appellants' pleas, was in even a more informed position than the trial court in *Lombardozzi*. Judge Carter had presided over the entire trial. He had heard and observed all of the Government's evidence, Podell's direct testimony and his cross-examination. He was in a ideal position to appreciate the real danger that these appellants might well be convicted on the bribery counts carrying 15-year maximum penalties. Consequently, he also could appreciate and understand the weakness of the defendants' bargaining positions. The evidence presented at the hearing fully support the Court's finding.

It was the appellants who first offered, as early as the day before the trial was to commence, to plead guilty to one count in the indictment. The Government rejected this first offer. In the midst of a cross-examination which revealed numerous prior false statements by Podell,* Podell offered to plead guilty to more than one count. The negotiations which took place from that point until the final entry of the guilty plea concerned primarily the counts to which Podell would plead guilty and even more specifically the objects of the conspiracy count he would admit. Podell's lawyer, without prior discussion with the Government, arranged an off-the-record conversation with the Trial Court in which defense counsel asked Judge Carter if he would indicate the sentence he would give. The Government objected to this and the Court refused to do so. During this conversation Podell's lawyer told the Judge that the reason for the guilty plea to the two counts selected was to avoid possible conviction on the bribery counts. There was no mention of any repre-

* See Addendum pp. 13a-19a.

sentations by the Government as to its position at sentence. In fact, the only discussion of the Government's position during this conference supports the conclusion that the Government made it clear that it would "argue" at sentencing (H. 71-73, 91-92). Podell and Miller then entered their pleas of guilty, which included detailed statements by counsel for the appellants and the Government as to their positions on the plea and a specific denial by both defendants of any threats or promises.

D. The Substantial Prejudice to the Government

In considering whether a defendant should be allowed to withdraw a guilty plea, it is entirely proper for the Trial Court and this Court to consider the prejudice to the Government if the withdrawal were permitted. *Lombardozzi I*, *supra*, 436 F.2d at 881. This factor, of course, involves a balancing of interests and turns on the degree of prejudice to the Government, on the one hand, measured against the merits of the defendant's claim on the other. Obviously when a plea is entered pre-trial as in *Santobello* there is much less prejudice to the Government than when one is entered after the Government's chief witness has already testified as in *Lombardozzi*. The prejudice in this case is even greater where the Government has not only presented its chief witness but also has presented its entire and has cross-examined one of the defendants at length.

Defendants should obviously not be allowed to plead guilty, as did Miller and Podell here, virtually at the very end of a trial, and then move to withdraw their pleas so that they can, armed with full disclosure of the Government's cross-examination, tailor their testimony to eliminate some of the impact of the false statements revealed during cross-examination. This is particularly so when they are represented by counsel who have attempted *this* tactic in the past and failed, in part, because the alleged Government promise was not made a part of the record.

On the other side of the ledger, the appellants do not allege any substantial prejudice. Neither appellant claims that he is innocent. Indeed, the evidence established that the appellants did far more than what they admitted during the plea. Podell and Miller both admitted their crimes in open court and the Court indicated to both that it could impose sentences of seven years and five years respectively. Both also knew that the Trial Judge had refused to give any indication of the sentence he would impose and both received very lenient sentences in light of the crimes they committed and the maximum sentence that could have been imposed.

POINT II

The appellants' formal explanation of their involvement in this crime provided a firm factual basis for the conspiracy plea. When combined with the other facts established during the Government's case and the Government's cross-examination of Podell, their claim that the sentencing court did not have a sufficient factual basis for these pleas becomes absurd.

The appellants' argument, which they did not raise below, that the record did not contain a factual basis for the Court's acceptance of the guilty pleas to the conspiracy count ignores not only the appellants' formal admissions of involvement in this conspiracy made prior to plea and sentence, but the evidence of their guilt presented during the Government's case and developed during Podell's cross-examination.

Podell and Miller's statements, given during the *voir dire* prior to the entry of the plea, and during the allocution prior to imposition of sentence,* provide firm factual support for the guilty pleas to the conspiracy count.

Podell stated uring the *voir dire* preceding entry of his plea:

> "If the Court pleases, while a Member of Congress and acting as a lawyer for Florida Atlantic Airlines and paid by Leasing Consultants, Inc. I appeared before various federal agencies including the CAB,

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* Statements made by a defendant during the sentence proceeding constitute part of the factual basis supporting the plea. This is so because Rule 11, Fed. R. Cr. P., places the burden on the sentencing court, not the court taking the guilty plea, to satisfy itself that there is a factual basis for the plea. See, *X* v. *United States*, 454 F.2d 255 (2d Cir. 1971).

tbe FAA, and advocated the interests of the said Florida-Atlantic Airlines.

I was indirectly compensated through my law firm for these appearances before the CAB and the FAA while a Member of Congress. I did not at anytime know that I was violating any law, but I intended to do what I did." [Tr. 1430-31]

Podell, speaking on his own behalf prior to imposition of sentence, in a rare moment of candor stated:

"I saw I was wrong. I committed an act, I violated a law . . . I guess I did violate the law and as a la[illegible]er, I must realize that. As a lawmaker, I have to realize that there was a law that I violated and so I was compelled to pay." (H. 137-138).

Miller, before entry of his guilty plea, stated:

"Your Honor, Congressman Podell was introduced to me as a congressman-attorney by Melvin Heiko. I, on behalf of Leasing Consultants, Inc. retained him for his influence. At the time I had no knowledge that I violated any of the laws of the United States. I understand now that I did." (Tr. 1435-36)

Miller at the time of sentence added:

"The only thing I would like to say, your Honor, is as I have told this Court before at the time of my acts I had no knowledge of the federal conflict of interest statutes. However, your Honor, I did know what I was doing was wrong from a moral point of view. It was a shortcut, it was just a ruthless way of accomplishing my own objectives." (H. 139-40).

In order to support a conviction on the conflict of interest charge, it was not necessary that either defendant admit conscious wrongdoing or evil motive. It is sufficient

to establish a violation of the conflict of interest section to show that a defendant is fully aware of the operative facts—that money was paid to, and received by, a Congressman, for services rendered by that Congressman before an agency of the United States. *United States* v. *Quinn*, 141 F. Supp. 622, 627 (S.D.N.Y. 1956); *United States* v. *Johnson*, 419 F.2d 56, 60 (4th Cir. 1969). The appellants concede that their admissions constitute a violation of the substantive conflict of interest statute, but claim that to support a conviction for conspiracy to violate the substantive statute, it is necessary to establish that they knew that their agreement violated a specific law.

The Supreme Court's recent decision in *United States* v. *Feola*, 43 U.S.L.W. 4404, March 19, 1975, disposes of this frivolous argument. In *Feola* the Court held that there is no greater degree of intent or knowledge required to establish a conspiracy to violate a substantive statute, than is required to establish the underlying substantive offense. *United States* v. *Feola*, *supra*, at pp. 4409-10. Since the *mens rea* required for violation of the substantive count, here conflict of interest, is merely knowing and intentional conduct, and not specific knowledge of the statute, no additional *mens rea* is required for conspiracy to violate this same statute. *Cf. Ingram* v. *United States*, 360 U.S. 672, 677-78 (1959) (there is no requirement that co-conspirators must have knowledge of the criminality of their objective as long as they have knowledge of the object of the agreement and the intent to agree to it).

The admissions preceding the plea and sentence clearly establish a conspiracy to defraud and to violate the conflict of interest section. Podell admitted during his statement prior to acceptence of the guilty plea all of the essential elements of the conspiracy charged in this indictment. Podell admitted that while a member of Congress he took money from Miller's company in return for appearing on its behalf before Federal Agencies. Podell admitted he did

this intentionally. Miller admitted paying money to Podell for this purpose and admitted knowing that it was wrong to do this. These statements establish an intentional agreement between Miller and Podell to defraud the United States by the improper use of official influence * and to violate the conflict of interest statute.

Moreover, the District Court in determining whether there is a factual basis for a plea is not limited and, in fact, should not be limited to information supplied by a defendant who "may often attempt to minimize his culpability during his allocution because he knows the same judge will be imposing his sentence." *United States* v. *Navedo,* Docket No. 74-1623, 2d Cir., March 17, 1975, p. 2318 (dissenting opinion, Kaufman, *C.J.*).**

The Court can find the factual basis for the existence of the requisite *mens rea* to support the conspiracy charge from the evidence produced at the trial. It is true that *Irizarry* v. *United States,* Docket No. 74-1866, 2d Cir., Dec. 1974, at pp. 911-912, requires the District Court to place on the record any facts it is relying on to find the factual basis for the plea. However, this plea was taken prior to *Irizarry,* and, unlike *Irizarry* which was a plea entered before trial, it was entered in the middle of a trial, after the

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* The offer to, and acceptance of, money in return for the use of the influence of public office to impair or defeat the lawful function of any department of government constitutes a conspiracy to defraud the United States. *United States* v. *Johnson,* 383 U.S. 169 (1969); *United States* v. *Carson,* 464 F.2d 424 (2d Cir. 1972); *United States* v. *Peltz,* 433 F.2d 48 (2d Cir. 1970).

** See also *McCarthy* v. *United States,* 394 U.S. 459, 471 (1969) ("Similarly, it follows that, if the record had been developed properly, and if it demonstrated that petitioner entered a plea freely and intelligently, his subsequent references to neglect and inadvertence could have been summarily dismissed as nothing more than overzealous supplications for leniency.")

Court had already ruled on the sufficiency of the evidence at the conclusion of the Government's case. The Court did not have to look to any matters outside the record and developed *after* the plea was accepted, such as a presentence report, to determine there was a factual basis for the plea. In fact, the Court had already determined there was sufficient evidence on this count to warrant a jury verdict of guilty beyond a reasonable doubt. The Trial Court had made it clear at the beginning of the *voir dire* preceding the guilty plea, that he did not think it was necessary to go into as much detail as usual since the plea was being taken after the entire Government's case had been presented.

In *North Carolina* v. *Alford,* 400 U.S. 25 (1970), the defendant was indicted for the capital crime of first degree murder. In the face of strong trial evidence of guilt, the defendant decide to plead guilty although claiming innocence to the charge. The Supreme Court held that it was permissible for the Trial Court to accept defendant's plea, since the evidence produced at trial substantially negated defendant's claim and provided a factual basis for acceptance of the plea.

Therefore, in view of the strong factual basis demonstrated by the Government during trial, Podell's patently false statements to the FBI, a Federal grand jury, and at trial, the factual admissions made by Podell and Miller prior to plea and sentence and the clearly expressed desire of Podell and Miller to enter the plea to the conspiracy count, the Trial Judge was warranted in finding a factual basis for this plea.

POINT III

The record demonstrates that the two appellants when they pleaded guilty not only understood the nature of the conspiracy to which they pleaded guilty but also knew all of the Government's evidence supporting that charge.

The appellants argue that at the time they pleaded guilty, the Court failed to make a sufficient determination that they understood the nature of the charge to which they were pleading. Considering that these pleas were entered by a lawyer and a sophisticated businessman after hearing all of the Government's evidence against them, in the midst of cross-examination of one of them and after extensive discussion as to the form of the plea with their attorneys, their argument is, once again, patently frivolous.

Even though the appellants moved below to vacate their guilty pleas this claim was never mentioned, or even suggested, in their motion papers, during detailed argument or during the testimony of the appellants or their attorneys. Neither appellant has the temerity to claim that *in fact* he did not understand the nature of a conspiracy when he pleaded guilty. Nor does he claim that he is innocent. Their claim is that the *voir dire* viewed in a vacuum does not technically and precisely demonstrate that they understood that a conspiracy involves an agreement to violate the law and that they participated in that agreement. However, the entire record established beyond any doubt that both these defendants had sat through several detailed explanations of the nature of a conspiracy charge, heard all of the evidence establishing the particular conspiracy to which they pleaded guilty and admitted facts during their allocutions which established that they agreed together to defraud the United States and to violate the conflict of interest statute.

Mr. Podell, a lawyer, and Mr. Miller, a successful businessman, sat through ten days of trial. They heard the Trial Court's description of the agreement alleged in the indictment, the means used to carry out that agreement and the overt acts alleged as explained to the jury prior to opening statements. (Tr. 6-7). They heard the Government's opening statement concerning the nature of the charges which not only made clear that a conspiracy is an agreement to violate the law but explained that the specific agreement charged was one in which Podell agreed to take, and Miller to pay, money in return for Podell's using his influence as a Congressman on Miller's behalf. (Tr. 12, 13, 17-18, 30). Unlike most defendants who plead guilty to a conspiracy charge, they heard not just a general description of the charge and the Government's theory, but all of the evidence explaining and supporting the conspiracy charge. They heard defense counsel's argument on their motions to dismiss at the conclusion of the Government's case which once again spelled out the essential elements of a conspiracy and of this specific conspiracy (Tr. 1116-19). Both defendants also heard the Government's response which also articulated the elements of a conspiracy—agreement to violate the law and knowing participation—and summarized the evidence establishing the agreement and participation of the defendants. (Tr. 1133-34). Podell himself took the stand and was specifically questioned about the nature of his agreement with Miller. (Tr. 1276-79). Both defendants participated in the negotiations and discussions concerning their plea as Podell's lawyer stated in his affidavit in support of a motion to withdraw the plea of guilty:

> "This plea came after several days of trial and during the defense case. The plea was the product of many hours of negotiations between attorneys for the Government and your deponent . . . Also present at various times were the defendants, Podell and Miller." (La Rossa Aff.)

Moreover, prior to the acceptance of the pleas, each lawyer made a detailed statement to the court, specifically stating the objects of the conspiracy admitted by the plea and specifically deleting the objects not admitted and certain other words from the conspiracy count to which the appellants were pleading. (Tr. 1428-29, 1433-34). This statement indicated a considered and planned determination about the crime to which each defendant was to plead. Both defendants assured the Court that they were fully aware of what was going on in the proceeding and each responded that he was fully aware of what was going on prior to the plea. (Tr. 1429-30, 1434-36)

Thus, this case does not even remotely resemble *Irizarry* v. *United States, supra.** There the defendant pleaded guilty prior to trial; at no time was he asked whether he understood the nature of the offense with which he was charged, *nor* did he say anything from which such an understanding might be inferred. Neither *Irizarry* nor *McCarthy* v. *United States*, 349 U.S. 459 (1969) imposes a requirement that the Court follow an exact ritual or that in order to convey an understanding of the nature of the charge it is necessary to painstakingly explain each and every element of the offense. *Sappinton* v. *United States*, 468 F.2d 1378 (8th Cir. 1972), *cert. denied*, 411 U.S. 970 (1973); *United States* v. *Sherman*, 474 F.2d 303 (9th Cir. 1973); *United States* v. *Ludo*, 435 F.2d 519 (8th Cir. 1970). Nor does *Irizarry* set out a hard and fast rule that all of the elements of a conspiracy

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* These pleas were taken on October 1, 1974 some two and a half months before this Court's decision in *Irizarry* v. *United States*, Docket No. 74-1866, 2d Cir., Dec. 19, 1974, and to the extent that *Irizarry* requires a detailed explanation of the nature of a conspiracy, this rule, surely, should not be applied to hold invalid a plea taken in the middle of a trial where not only the nature of conspiracy in general had been explained but the evidence supporting this particular conspiracy had all been presented.

charge must always be stated and explained to the defendant in every situation.

The record before this Court convincingly demonstrates that Bertram L. Podell and Martin Miller pleaded guilty with full understanding and knowledge of the charges in accordance with the requirements of Rule 11. The suggestion that their understanding of the charges against them at the time they pleaded guilty was no different than that of Bolivar Irizarry in his case is simply silly and does not merit the serious attention of this Court.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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ADDENDUM

Detailed Statement of Facts

A. The Government's Case

In March, 1968, Martin Miller as President of Leasing Consultants Incorporated (LCI) began negotiations for the acquisition of Florida Atlantic Airlines, and in June, 1968, Miller's corporation in fact acquired Florida Atlantic, apparently in the belief that Florida Atlantic was authorized to provide scheduled service between Florida and the Bahamas. Shortly after the acquisition was completed, it became apparent that Florida Atlantic did not have that authorization. Kenneth Burnstine, President of Florida Atlantic, retained James Juliana, an airline consultant, to represent Florida Atlantic in its efforts to obtain authorization to fly Route 9, the official designation for the Florida-Bahamas Route. On March 22, 1968, Juliana submitted to the CAB a formal application * to designate Florida Atlantic to fly Route 9. (Tr. 62, 154, 276-77, 346-50; GX 22).**

In this case, the CAB in June, 1968, forwarded its intent to designate Florida Atlantic to the State Department which, in turn, forwarded that intent to the British Government. However, the British Government and the Bahamian Government disapproved the application because of Florida Atlantic's history of illegal flights. On October 24, 1968 the CAB notified Florida Atlantic that because of the disapproval of the British and Bahamian Governments, it would not proceed with the designation. (Tr. 352-54, 361-63; GX 24, 27).

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* The procedure for obtaining a Route 9 designation involves several steps: (1) initial review by the CAB, and if approved, the notification of the State Department of its intent to designate; (2) the State Department's forwarding that *intent* to the Board of Trade in London, England; (3) approval by the Board of Trade, conditioned on approval by the Bahamian Government; (4) ultimate designation by the CAB if all parties agreed. (Tr. 348, 666-673).

** "Tr." refers to the Trial Transcript; "GX" to the Government Exhibits at trial.

In the fall of 1968, Miller and Burnstine, using Michael Zorovich, another official of the airline, as a middleman, decided to bribe Bahamian officials in order to change the Bahamian position on Florida Atlantic Airlines.* The first bribe was an offer of $15,000 to the Bahamian Minister of Tourism in order to influence that Minister to change his position on the airline. (Tr. 279, 358-60). The second was an offer of $25,000 which was sent to the Bahamas by check and put in escrow for that official to collect, if and when he communicated his approval of the airline's application to the British Government. Apparently both of these offers were rejected and by December, 1968, it was clear that Miller would not be able to obtain Route 9 by bribing Bahamian officials. (Tr. 155-56, 169-70, 419-27, 1106-07, 1108-10; GX 30, 36, 58)

The strategy now changed. At a meeting held in early December, 1968, Miller and Burnstine, after discussing this matter with their corporate counsel, Melvin Heiko and James Bush, decided that they would try to reach Congressman Bertram Podell and ask him to use his influence to intercede with the Bahamian and American authorities. Heiko, a former law school classmate and associate of Podell's from Albany, contacted the Congressman. During a telephone conversation and subsequent meeting, the Congressman told him that he would handle this matter, that he knew influential people in the Bahamas and was familiar with aviation matters since he was a member of an aviation committee in the House of Representatives. (Tr. 63-69, 171, 176-79, 282-84, 426-28, 492).

On December 16, 1968, Podell, Miller and Heiko flew from New York to Miami and, on the following day, from Miami

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* Miller admitted one of these bribes in his testimony under oath before the Grand Jury. This portion of his Grand Jury testimony was admitted in evidence (Tr. 1108-10; GX 58).

to Freeport in order for Podell to discuss this matter with a friend of his George Kates, who, according to Podell had a great deal of influence in the Bahamas. (Tr. 69-71). On December 17, 1968, Podell, Miller, and Heiko met with Kates in the Bahamas and Kates explained that he could not help them because he no longer had any contacts within the Bahamian Government. (Tr. 69-71, 880-84).

Having failed on this first attempt, Podell and Miller flew back to Washington, D.C., and on December 18, 1968, met with James Juliana so that Podell and Juliana could coordinate their efforts toward pressuring the CAB and State Department to proceed with Florida Atlantic's application. During this meeting Miller told Podell that more could be done with the CAB and State Department and Podell agreed to call certain officials at the CAB. Miller then suggested taking Podell back to the Bahamas "as a show of strength" and Podell agreed. (Tr. 369-72).

On the following day, December 19, 1968, Podell travelled back to the Bahamas and met with one of the Bahamian ministers to discuss the airline's problems. (Tr. 74-77). The same day, December 19, 1968, Podell sent a letter to the CAB on behalf of Florida Atlantic Airlines urging the CAB to expedite Florida Atlantic's pending application. This letter was sent out on Podell's congressional stationery. Also on the very same day, the Congressman's law firm, Podell and Podell, sent out a bill for $10,000 for the professional services that Congressman Podell had rendered to date, which included the two trips to the Bahamas, the Podell-Juliana meeting to discuss efforts to influence the CAB, and the Podell letter to the CAB on Florida Atlantic's behalf. Apparently, during this same period, Podell requested and Miller agreed to pay Podell a $1,000.00 per month retainer in order for Podell to represent Florida Atlantic Airlines on this Route 9 problem. (Tr. 83-84, 284-88, 683-86, 807; GX 12 and 13).

Co-defendant Martin Miller described to his brother and business associate David Miller the $10,000 bill from Podell as being "for services rendered and to be rendered" by Podell and said that the December 19, 1968 letter by Podell to the CAB was a part of those services. (Tr. 286-88; GX 12, 13).

On January 15, 1969, Martin Miller, Zorovich, Juliana and Podell met in Congressman's Podell's office. Podell agreed to speak to CAB officials in an effort to assist Florida Atlantic in its efforts to obtain a Route 9 designation. (Tr. 377-78)

On February 10, 1969, Podell traveled back to the Bahamas and met with United States Consul Turner B. Shelton. Podell, purporting to be a disinterested Congressman when, in fact, he was the paid representative of Florida Atlantic, told the U.S. Consul that he was concerned about the unfair treatment Florida Atlantic Airlines was receiving at the hands of the Bahamian Government. He stated that he thought the airline deserved the designation and asked Shelton to arrange a meeting for him with Warren Levarity, the Bahamian Minister of Tourism. (Tr. 576-579; GX 40-D.) Levarity had previously refused to see any representatives of Florida Atlantic because of Florida Atlantic's long history of illegal flights to the Bahamas. He agreed to see Podell and Florida Atlantic's representatives on February 10, 1969, only as a courtesy to a United States Congressman. (Tr. 603-04) Again, Podell, posing as a disinterested public servant when, in fact, he was being paid for his services, met with Levarity, vouched for the reliability of Florida Atlantic and urged Levarity to approve the airline's request. Levarity told Podell that the Bahamian Government was opposed to this designation and would not change its position on Florida Atlantic. (Tr. 594-97).

Shortly after Podell's return to the United States, his law firm sent another bill charging $1,000 for the monthly

retainer and $1,350 for Podell's services rendered on February 10, 1969, namely, his representation of Florida Atlantic at the meetings with Shelton and Levarity. (Tr. 293-94; GX 15).

Having once again failed in his attempt to influence the Bahamian government, Podell now turned his attention to the CAB. During February and early March, 1969, Podell made several telephone calls to the CAB on Florida Atlantic's behalf. In early March, 1969, Podell called Ronald Kinsey, the CAB staff officer in charge of the Florida Atlantic application and told Kinsey that the CAB should give Florida Atlantic more assistance in clearing the designation for Route 9 and should assist the Airline in getting a hearing on its permit application. (Tr. 698, 700-05). Thereafter Kinsey received a call from Podell's office directing him to come to the Congressman's office. Kinsey refused to go. As an alternative, Podell, through the CAB Congressional liaison officer, John Dregge, arranged a meeting at the CAB. (Tr. 706-09).

On March 10, 1969, Podell and Miller met with Kinsey and Dregge at the CAB. During this meeting Podell represented the Airline and told the CAB officials that the Airline was in danger of going out of business unless it received the Route 9 designation. Podell told the officials that the CAB was not taking adequate steps toward obtaining designation. The Congressman urged that the CAB help Florida Atlantic to obtain a hearing with the Bahamian government. The Congressman also falsely represented that the Bahamian government was now favorably inclined; toward Florida Atlantic.* Kinsey told Podell he believed the Bahamians were still opposed to Florida Atlantic. Podell insisted to the contrary and began raising his voice. Dregge ended the

* This was a blatant misrepresentation, since Podell had just been told by Levarity on February 10, 1969 that thee Bahamian government would not change its negative position. (Tr. 594-97).

meeting by promising Podell the CAB would check on the accuracy of his statement as to the Bahamian position. (Tr. 710-21, 722-24, 726-29). The CAB then wired the U.S. Consul who checked and reported back to Dregge that contrary to Podell's representation, the Bahamian government still opposed Florida Atlantic's designation. (Tr. 729-32; GX 40E-1, 40F-1). Several days after this meeting Podell sent out another bill containing an additional $1,000 charge on the retainer agreement. (GX 17).

Shortly before April 1, 1969, Podell called Robert Carnahan, the FAA Congressional liaison officer, and asked him to come to Podell's office. When Carnahan arrived, Podell asked him if the FAA could assist Floida Atlantic in getting authority to fly from Florida to the Bahamas. Carnahan told Podell that this matter was not within the FAA's jurisdiction. Approximately one week later, Podell again called Carnahan and asked Carnahan to come to his office. Before doing so Carnahan checked on Florida Atlantic's status and discovered that the FAA was about to suspend Florida Atlantic's right to fly.* However, realizing that Podell's interest in this airline was much stronger than usual, even by Washington standards, Carnahan did not disclose this information to Podell at their meeting. During the course of the meeting Podell told Carnahan that the FAA "should get off their ass" and help Florida Atlantic. (Tr. 866-74).

On April 1, 1969, the FAA formally revoked Florida Atlantic's right to fly due to the Airline's long history of illegal flights. (Tr. 185-86, 646). On April 3, 1969, Miller and one of his attorneys, Martin Bush, met with Podell in his Congressional office and explained this new problem to the Congressman. Podell said he would get to the bottom of this and called an official at the FAA. Podell demanded

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* The suspension and subsequent revocation caused the airline to cease all flights, not just flights between Florida and the Bahamas.

that the official come to his office immediately and bring the entire file so he, the Congressman, could examine it. When the official refused to comply, Podell told the official he had not heard the end of this matter. Podell then dictated Florida Atlantic's notice of appeal and instructed Bush as to whom he should contact at the FAA. (Tr. 188-89; GX 7, 8).

The stakes for Miller and his airline had now become much higher. No longer were they concerned only about their right to fly from Florida to the Bahamas. Their right to fly anywhere had been suspended by the FAA and the oral argument on the appeal from this suspension was set for May 10, 1969. (GX 10). Podell had sent out bills of $1,000 per month for the months of March and April under his retainer agreement with Miller's airline. The airline had paid to Podell the original $10,000 for Podell's letter to the CAB, his discussions with Bahamian officials and future services in obtaining the Route 9; the airline had also paid the $1,000 retainer billed on March 1, 1969 and $1,350 for Podell's representing Miller's airline before the United States Consul in the Bahamas and before the Bahamian Minister of Tourism. However, Miller did not pay his bills for March and April, 1969, and Miller's brother had told him that the corporation should pay nothing further to Podell. (Tr. 295). In fact, in mid-April 1969 Podell called Melvin Heiko, explained to Heiko that he had negotiated a $1,000 per month retainer with Miller and complained that Miller was not paying it. (Tr. 83-84).

On May 1, 1969, only ten days before the scheduled oral argument appealing the FAA revocation order and some two weeks after Podell had complained that Miller was not paying the retainer, Miller handed Podell a personal check for $29,000. The name of the payee was left blank and Podell was later forced to admit on cross-examination that he, Podell, had filled in the payee as the "Citizens Committee for B. L. Podell." (Tr. 1400-01; GX 19). Podell then

turned that check over to his finance chairman. Later, when asked by the finance chairman whether it should be reported, Podell instructed the chairman not to report it as part of the campaign contributions reported to the House of Representatives, the New York Secretary of State, or the New York City Board of Elections. (Tr. 527-28, 532; GX 19).

Finally, in June, 1969, the FAA's order revoking Florida Atlantic's right to fly was sustained and the airline's license was revoked. (Tr. 201; GX 11). A year later, in June, 1970, Podell once again made an attempt to use his influence to revive Florida Atlantic's application by arranging a meeting between counsel for the airline and a CAB official, but this effort also failed. (Tr. 826-31).

Podell's receipt of over $41,000 to use his influence to assist Florida Atlantic would have remained concealed had not the Wall Street Journal published an article in August, 1971, alleging that Podell's representation of Florida Atlantic had been very suspicious and had constituted a violation of Federal law. These disclosures sparked a whole new series of crimes committed by Podell in a desperate attempt to conceal his and Miller's violations of the law.

Podell was first interviewed by the FBI in November and December, 1971, and based on these interviews the agents prepared a written statement for Podell's signature. (Tr. 904-09, 913-22; GX 53). Podell read over the statement and acknowledged that it was accurate, but when asked to sign it, refused to do so. Podell was again interviewed by the FBI in January and April, 1972, and he continued to refuse to sign the statement. (Tr. 924-28, 1022-33, 1044-45, 1049-64, 1080; GX 56). Finally on June 22, 1972, Podell signed it. (Tr. 928-29; GX 55). Then on May 4, 1973, Podell testified before a Grand Jury that he had told the full and complete truth to the FBI. (Tr. 113-15; GX 57).

In fact, the statements to the FBI contain serious affirmative misrepresentations and omissions. The omissions include absolutely no mention by Podell of the $29,000 check Miller handed to him. The misrepresentations include: (1) that he, Podell, only performed one service for the airline and that was his first trip to the Bahamas (GX 53); (2) that he never handled anything else on a fee basis for Miller's corporation (GX 53); (3) that his service for Miller on the Route 9 matter involved just one letter to the CAB and one meeting with the CAB Congressional liaison official (GX 53); (4) that he could not recall ever calling the FAA on Miller's behalf (GX 53); (5) that he did not get paid by Miller for these services and was doing it out of friendship as he would do for any friend or constituent (GX 56); (6) that he took only one trip to the Bahamas rather than three (Tr. 918); (7) that he never met with the United States Consul on behalf of Florida Atlantic (Tr. 918); (8) that he did not meet with any Bahamian official (Tr. 918).

Furthermore, when asked by the FBI to produce his correspondence with the CAB, Podell produced two letters from the CAB to him and a courtesy "thank you" letter he had sent to the CAB (GX 44, 47, 48). However, he did not produce his original December 19, 1968 letter to the CAB which his co-defendant Miller had described as being one of the services contemplated by the $10,000 paid to Podell by Miller. (GX 13). When asked to make copies of the letters Podell had shown to the Agent, he refused to do so, saying he did not want "to fry in my own grease." (Tr. 918-19).

In April, 1973, after being notified he would be questioned about these matters in a Grand Jury and before his appearance, the defendant Podell met with Melvin Heiko and told Heiko that he was the subject of a Federal Grand Jury investigation involving conflict of interest and possible bribery. Podell told Heiko, referring to the trip they had taken together concerning Florida Atlantic, that it only concerned arranging for gambling junkets. Heiko told him that

his recollection was that they were there to "straighten out the problems of Florida Atlantic Airlines with the officials in the Bahamas who were interfering with the flights." Podell then repeated that his sole recollection was that they were there to arrange junkets.* (Tr. 89).

Apparently concerned that Heiko's recollection could incriminate him, Podell asked Heiko if he had given a statement to the FBI. Heiko said he had not. Podell's concern then shifted to the question of whether Bush, Heiko's partner, had given any statements that could incriminate him. Podell asked if Bush had given a statement to the FBI. Heiko said he did not know. Podell asked Heiko to find out and insisted that Heiko find out immediately. Podell then walked Heiko over to the nearest phone. Heiko called Bush and after talking to Bush, informed Podell that Bush had not given a statement to the FBI. Podell replied, "Good." (Tr. 86-90).

B. The Defense Case

1. Reputation Witnesses

The defense called 10 reputation witnesses and the defendant.

Six of the 10 witnesses were political figures. They included three Congressmen, the Brooklyn Borough President, a New York City Councilwoman, and a former colleague of Podell's from the New York State Assembly. Podell also called two Roman Catholic priests and a rabbi.

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* Along with Heiko, George Kates testified that the meeting Podell was referring to concerned Florida Atlantic's problem flying to the Bahamas and had nothing to do with junkets. (Tr. 884).

2. Podell's Direct Examination

Bertram L. Podell testified in his own defense.

Podell explained that he was a lawyer elected to Congress during a special election in February, 1968. Previously he had served for ten years as a member of the New York State Assembly. (Tr. 1163). At the time of his election to Congress, he also was a member, along with his father, Hyman, and his brother, Herbert, and others, of the law firm of Podell and Podell. He claimed that shortly after his election he and his brother set up a separate law firm of Podell and Podell excluding himself as a partner. (Tr. 1167-79)*

Podell admitted that in December, 1969, Melvin Heiko introduced him to Miller and that he traveled to the Bahamas with Miller. He testified, however, that this meeting had absolutely nothing to do with getting the airline a Route 9, but dealt mainly with obtaining hotel rooms in the Bahamas, arranging a package deal with casinos for those who travelled to the Bahamas and solving the problem of getting landing rights from the Bahamian government for the Airline. (Tr. 1181-84, 1187-88). Podell said he had attempted to arrange this through George Kates, but was not successful because there had been a change in the Bahamian government and Kates had apparently lost the influence he once possessed. (Tr. 1195-96). Podell arranged for a total fee of $10,000 for the trip, keeping $6,500 for himself and giving $3,500 to Heiko. (Tr. 1185-86). Podell admitted that the bill for professional services rendered was sent out by the law firm of which he was a mebmer, on the same day as his letter to the CAB on behalf of the airline, that is, December 19, 1968, but denied that the bill had any connection with the letter. (Tr. 1200-02; GX 12, 13) Podell

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* This testimony serves as one strong indication that Podell, contrary to his statements preceding plea and sentence, was aware of the federal conflict of interest statute.

claimed the letter was a normal inquiry letter which he has sent as a Congressman a thousand times. (Tr. 1205-06). Podell denied that Miller, as Juliana had testified, had asked him to go down to the Bahamas as a "show of strength." (Compare Tr. 372 with Tr. 1207).

Podell admitted, after having denied this to the F. B. I., that he had made a trip to the Bahamas on Florida Atlantic's behalf during February 1969 (Tr. 1210). He claimed the purpose of the trip was to discuss the airline's designation problem with Florida Atlantic's Bahamian counsel and that he met with the United States and Bahamian officials only because Florida Atlantic's attorneys were unavailable. (Tr. 1210-14). Podell had denied to the F.B.I. that he had ever met with any Bahamian or United States officials in the Bahamas in this matter. (Tr. 918). Podell said he charged $1,000 for this trip. (Tr. 1216-17).

Podell admitted going to a meeting with Miller at the CAB on March 10, 1969, but said it merely concerned his telling the CAB officials that the Bahamian government had changed their position and were now favorably disposed toward the airline. He did not specifically affirm or deny that the March 17, 1969 bill carried an additional $1,000 charge for this service. (Tr. 1239-40). Podell testified that at his meetings with the CAB he was acting as a Member of the House of Representatives and not as a lawyer. (Tr. 1246).

Podell admitted that Miller had advised him of Florida Atlantic's subsequent problems in April, May and June, 1969 with the FAA, but said he had no recollection of meeting with Carnahan of the FAA.

Podell also testified that during a dinner with Miller in 1969, he had told Miller that the Brooklyn Democratic county leader wanted to promote Podell as a possible candidate for the United States Senate, and after discussing the

costs of running campaigns Miller offered him a contribution. (Tr. 1257-59). After the dinner, Miller gave him a check for $29,000 which on direct examination Podell claimed was made out to his campaign committee. (Tr. 1259). Podell said he did not file any report of this contribution because although New York law and Federal law, as judicially construed, required reporting all contributions, he had concluded he did not have to file. (Tr. 1269-70).

Podell denied ever having made any knowingly false statements to any of the FBI agents who interviewed him. (Tr. 1274-75) Podell also testified that he did not believe any of the answers he gave to questions asked in the Grand Jury were false. (Tr. 1293-94).

3. Podell's Cross-Examination

Podell had claimed on direct that there was a second law firm of Podell and Podell of which he was not a member and that the retainer agreement with Miller's airline involved this second firm of Podell and Podell. However, when pressed on cross-examination Podell admitted that despite the alleged seven year existence of this so-called firm he did not know of any other clients (Tr. 1306, 1342), any court papers evidencing its existence, any other records of legal work done by it (Tr. 1306-07), or any listing for it in the Martindale-Hubbell Law Directory. (Tr. 1304-06). He said he did not even know whether this so-called law firm ever filed a tax return. (Tr. 1341-42).

Podell denied that he had ever told the FBI, as Special Agent Boland testified and his report confirmed, that he was not aware of Florida Atlantic Airlines at the time of his first trip to the Bahamas and that the trip had nothing to do with the airline. (Tr. 1316-17; GX 56).

Podell denied ever telling the FBI, as Special Agent Broden testified and his report confirmed, that he could not

recall the purpose of his first trip to the Bahamas except that it was to make an introduction (Tr. 1318-19). Podell said that he did not tell Broden the purpose of the trip because he thought that to do so might violate the attorney-client privilege (Tr. 1319). Podell insisted that this was a valid invocation of the privilege and not an attempt to conceal evidence (Tr. 1319-20). However, just two months later Podell told the Agent the purpose of the trip, that is, he told him it was "in connection with a promotion gimmick" for the airline. (Tr. 1321-24). Podell, of course, denied making this statement to the Agent. At first, Podell said he just told the Agent the general purpose of the trip and a few answers later contradicted himself and denied telling this to the Agent (Tr. 1323-25).

Podell denied having traveled back to the Bahamas during December, 1968, and denied having discussions with a Bahamian official during this second trip. Podell persisted in this denial even when confronted with Heiko's records that evidenced such a trip. (Tr. 1329-30; GX 1)

Podell at first said he had no diary for the year 1968. (Tr. 1329-30). He said he could not recall the exact dates of trips because, "I didn't keep a diary." (Tr. 1333-34). When pressed he said his secretary kept a diary, but that he could see from 30 to 40 individuals and have 17 to 18 engagements per day. (Tr. 1334). When asked whether he took so many trips to the Bahamas with private businessmen that he did not make diary entries, he said he probably kept such records at his law firm. (Tr. 1334-35) However, he claimed he could not locate that diary. (Tr. 1336, 1340-41).

Podell testified that to his knowledge Florida Atlantic never had an application for a Route 9 *pending* before the CAB. (Tr. 1356). However, when confronted with his own letter of December 19, 1968, in which he specifically referred to Florida Atlantic's "application as a carrier on Route 9" and that "[t]his applicating has been *pending* for many

months," he said he really knew nothing about what was going on. (Tr. 1356-58; GX 12).

Podell denied that the reason for his February 10, 1969 meetings with the United States Consul and the Bahamian Air Minister was to influence them to act favorably on Florida Atlantic's application. (Tr. 1362). Podell claimed that Miller took him to the Bahamas to talk to Miller's Bahamian counsel. (Tr. 1363). Podell at first denied discussing the Airline's problem with the American official, eventually admitted it but claimed that the conversation was merely casual. (Tr. 1363). Podell charged and was paid $1,000 for this casual conversation. (Tr. 1364; GX 15).

According to the trial testimony of the former Bahamian minister, Warren Levarity, he, Levarity, had told Miller and Zorovich that he would not discuss this application with anyone from Florida Atlantic. Levarity testified that the only reason he did so on February 10, 1969 was as a courtesy to a United States Congressman. (Tr. 594-97). Podell claimed he did not know this and that in December, 1968, Kates had given them Warren Levarity's name as the Minister they should see. When confronted with the fact that this was impossible because Levarity was not a Minister in December, 1968, he said Kates must have given them another name. (Tr. 1366).

Podell admitted during cross-examination, now confronted with Shelton and Levarity's testimony, that he had met with an American and Bahamian official in the Bahamas. (Tr. 1372). According to the testimony of Special Agent Broden, Podell told him he had no recollection of meeting any American or Bahamian officials in the Bahamas. (Tr. 918). Podell denied ever saying this to Broden (Tr. 1373).

Podell claimed that the $1,000 charge for services performed as of February 10, 1969 which involved, in toto,

one meeting with the United States Consul and one meeting with the Bahamian minister, was for services performed as a lawyer and not for the use of his influence as a Congressman. (Tr. 1373-74). However, he admitted on cross that in both meetings he had introduced himself as a United States Congressman and had never explained to either official that he was a lawyer or a paid representative of Florida Atlantic. (Tr. 1368-69). In fact, Levarity agreed to the meeting only because he was a Congressman. (Tr. 918).

Podell's signed statement given to the FBI recited that the only legal service performed for Miller was Podell's December, 1968 trip to the Bahamas. (Tr. 1374-75; GX 55). When confronted on cross with the February 10, 1969 meetings in the Bahamas which Podell characterized as involving legal services for which he charged $1,000, Podell admitted that this part of the statement to the FBI was not true. (Tr. 1375).

Podell admitted the March, 1969, meeting with the CAB. (Tr. 1379). However, he denied ever calling Mr. Kinsey, the CAB staff official in charge of this application, prior to the meeting and discussing it with Kinsey. (Tr. 1379). Podell denied telling the CAB officials, as they had testified, that the CAB should help Florida Atlantic get a hearing with the Bahamian Government and that the CAB was not taking as effective action as it could for Florida Atlantic, (Tr. 1380-81). Podell denied ever telling the CAB officials that the CAB was not doing enough for Florida Atlantic. (Tr. 1381-82). Podell also denied ever telling the CAB that they should unilaterally designate Florida Atlantic and that they should get Bahamian approval for a permit for Florida Atlantic. (Tr. 1382).

Podell stated that at the time of this meeting, March 10, 1969, his firm no longer represented Florida Atlantic Airlines. Podell was then confronted with a bill dated March 1, 1969 for $2,350 including $1,000 for Podell's February 10,

1969 services and one dated March 17, 1969 for the original $2,350 and for an additional $1,000 (GX 15, 17). Both bills were sent out by the firm of Podell and Podell and carried Bertram Podell's name as a partner. (Tr. 1383; GX 15, 17). Podell claimed that the bill sent out on March 17, 1969, just seven days after the CAB meeting, was not from his firm, even though the bill carried his name on the letterhead as a partner and listed a late charge for services which he now admitted were performed by him. (Tr. 1383-84; GX 17).

Podell denied, as Miller's lawyer Martin Bush had testified, that he ever called any FAA officials on Miller's behalf concerning the FAA's revocation of Forida Atlantic's right to fly. (Tr. 1393-94). Podell said that he now recalled a meeting with Robert Carnahan of the FAA. (Tr. 1395). He was then confronted with his signed false statements to the FBI in which he stated he did not recollect any calls to the FAA, did not know a Robert Carnahan and did not recall talking to him. (Tr. 1396; GX 55).

Podell denied ever having a retainer agreement with Miller or any of Miller's company. Podell continued to deny this even when confronted not only with the March 1 and March 17, 1969, bills to Miller's corporatiton (GX 15, 17) showing charges "per agreement" but with bills for April 2 and May 1, 1969. (Tr. 1397; GX 18). All four bills were on letterhead carrying the defendant's name as a partner and showed certain charges "per agreement." (Tr. 1397-98; GX 15, 17, 18). Podell denied calling Heiko, as Heiko had testified, in mid-April, 1969, and telling Heiko that Miller was not paying his retainer. (Tr. 83-84, 1396-97, 1398).

Podell denied that once Miller ran behind in paying the retainer in mid-April, 1969, he and Miller agreed that he would take money from Miller under the guise of a campaign contribution. (Tr. 1398). However, when confronted

with the check carrying his handwriting, Podell was forced to admit that Miller had given him a check for $29,000 without having filled in the name of the payee and that Podell had filled this in in his, Podell's, handwriting. (Tr. 1400-01).

Podell admitted he had never received a contribution as large as $29,000 before or since (Tr. 1402-03). He claimed that he had once received a $20,000 contribution, and when asked if he reported it, he said yes. (Tr. 1403-04). Podell refused to divulge the name of the donor and revealed the name only after being directed to do so by the Court. He said the donor of the $20,000 contribution was Meshulam Riklis. (Tr. 1404) A search of all of Podell's reports of contributions filed for any and all campaigns failed to reveal any listing of a $20,000 contribution from Meshulam Riklis or anyone else.

Podell denied that he did not report the $29,000 check, which was received a year and a half before he next stood for re-election, because he wanted to conceal it. He said he did so because the law did not require reporting of non-election year contributions. (Tr. 1405-06). When confronted with the New York statute in force at the time that required that a campaign committee report any and all receipts (Tr. 1407-08), Podell claimed that the check was not made out to a committee within the statute because the payee was the Citizens Committee for B. L. Podell and did not refer to an election or re-election. (Tr. 1408). The Government then put in evidence the ledger sheet indicating the check was deposited in the account of "the Citizens Committee for the *Re-election* of Bertram L. Podell for Congress." (Tr. 1410-11; GX 61) (emphasis added). Podell finally admitted the committee existed for the purpose of re-electing him to Congress. (Tr. 1413).

Podell testified that in 1968 he was involved in three elections, a special election in February, a primary, and a regular election. (Tr. 1312). He testified he spent over $100,000 in these three elections. (Tr. 1312-13, 1415). Podell estimated that he spent well over $10,000 in each one of these elections. Podell admitted that in 1968 he was required to file all campaign expenditures with the Clerk of the House of Representatives. (Tr. 1416). All the documents filed with the House of Representatives for the year 1968, for all three elections, show that Podell and his committees reported only $1,500 in expenditures and $5,000 in contributions. (Tr. 1419-23; GX 63, 63A, 63B, 63C). When confronted with this, Podell claimed that he had never personally received any campaign contributions, that all contributions were paid through committees. When confronted with records that showed he in fact personally received contributions, he first claimed the records indicated contributions to a committee, then admitted they showed contributions to him personally, but said they should not have. (Tr. 1425-27).

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SANDRA A. KING being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 4th day of April, 1975 she served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

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and deponent further says that she sealed the said envelope and placed the same in the mail drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Sandra A. King
SANDRA A. KING

Sworn to before me this
4th day of April, 1975

JOSEPH M. [illegible]
Notary Public, State of New York
No. 31-7065525
Qualified in New York County
Commission expires March 30, 1976